

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative  
Penalty Order Issued to Champion  
Environmental Services, Inc.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on May 9, 2002, at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota. The record closed at the close of the hearing that day.

Jim Swanson, Vice President of Champion Environmental Services, Inc., 2885 Country Drive, Suite 150, Little Canada, Minnesota 55117, appeared on behalf of the Respondent (hereinafter "Champion"). Jocelyn F. Olson, Assistant Attorney General, 1200 NCL Tower, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Health (hereinafter "the Department").

**NOTICE**

Notice is hereby given that, pursuant to Minn. Stat. § 144.991, subd. 5(e), the final decision of the Commissioner of Health shall not be made until this Report has been made available to the parties to the proceeding for at least five days, and an opportunity has been afforded to each party adversely affected to comment on the recommendations. The Commissioner must consider such comments before issuing the final decision. Exceptions to this Report, if any, shall be filed with the office of Commissioner Jan Malcolm, Minnesota Department of Health, 85 Seventh Place East, Suite 400, St. Paul, MN 55101.

**STATEMENT OF ISSUES**

1) Whether the Administrative Penalty Order (APO) is invalid because the Afton-Lakeland Elementary School renovation project does not meet the required threshold amount of 260 linear feet of asbestos containing material (ACM) under the definition of "asbestos-related work" in Minn. Stat. § 326.71, subd. 4?

2) If the Asbestos Abatement Act does apply, has the Department proven that the applicable statutes or rules were violated?

3) If the appropriate statutes and rules do apply and violations were committed, is the proposed nonforgivable penalty of \$6,500 and forgivable penalty of \$500 for such violations appropriate?

Based on the testimony, records, and filings in this matter, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Champion is licensed by the Department of Health to perform asbestos removal. Champion successfully bid on the asbestos removal portion of a project being conducted at Afton-Lakeland Elementary School in the Stillwater School District. The project was being overseen by the Institute for Environmental Assessment (IEA). IEA divided the project into five phases. Phase 1 was described as the removal of 30 linear feet of millboard pipe insulation and 25 linear feet of preformed pipe insulation.<sup>[1]</sup> The location was described as the “North-South Corridor From Room 101 to Room 111.”<sup>[2]</sup> The start and finish dates for Phase 1 are from March 19 to March 23, 2001.

2. IEA described Phase 2 as the removal of 25 feet of ACM in the form of millboard pipe insulation and fittings in the “North-South Corridor from Room 201 to East of Gymnasium.”<sup>[3]</sup> Phase 3 was the removal of five linear feet of ACM in preformed pipe insulation and fittings on March 22, 2001.<sup>[4]</sup> This material was located on the west wall of the Gymnasium. Phase 4 was the removal of a unit ventilator assumed to contain ACMs. Phase 5 was the removal of 4,000 square feet of vinyl floor tile and mastic. The dates for these four phases of the project were identified as between March 19, 2001 and to March 23, 2001.

3. On March 19 to March 23, 2001, Champion conducted asbestos removal from the school. This period coincided with the spring break in the school schedule. No Notice of Intent to perform asbestos abatement work was filed with the Department.

4. The ACM removed by Champion in Phase 2 was the insulation on pipes located in a wall cavity, above the level of the ceiling. Two pipes ran the total length of the hallway and other pipes branched off of those two pipes. The entire length of each pipe was covered with ACM in the insulation on the pipe. The wall bordered a hallway in the elementary school. Student lockers are embedded in that wall cavity, opening onto the hallway. The lockers are approximately four feet below the pipes with the ACM. These lockers have ventilation holes on top, opening to the wall cavity containing the ACM. The other side of the wall borders classrooms.

5. Champion removed ACM from portions of the pipes with the use of glove bags. These bags were attached at intervals of eight feet along the ACM-covered pipes. The ACM-containing insulation was removed only at points eight feet apart to provide access for cutting the pipes. The pipe removal was scheduled to occur in the summer. Champion wrapped the remaining insulation on the pipes in polyethylene to prevent the spread of ACMs before the pipes were removed.<sup>[5]</sup> The only purpose for the

ACM removal conducted was to enable the cutting of the pipes. None of the workers doing the removal had looked down into the wall cavity to see what was underneath the removal sites. No covering was placed over the lockers inside the wall cavity underneath the locations where ACMs were removed.

6. Students returning to school on March 26, 2001 found that their lockers had dust inside. A student returning home told a parent about the dust. That parent contacted the school, where an administrator investigated on March 27, 2002. Champion was contacted and they returned to clean the dust. Testing on the dust showed that it was ACM. The Department was informed that a potential release of ACMs had occurred.

7. On March 28, 2001, the Department sent inspectors to view the worksite where the ACM had been removed. Photographs were taken of the worksite, including the tops of the lockers where the ACM had entered. IEA and Champion acknowledged that the lockers that had dust inside were located where ACM removal had been performed. James Pierce from Champion indicated that the wall cavities were not inspected to determine if ACM was present or had not been properly removed. The inspectors noted that the remaining 550 linear feet of piping (covered with undisturbed ACM) in Phase 2 was wrapped in polyethylene sheeting. IEA told the inspectors that these preparations were in anticipation of the removal of the pipes to be done during the summer of 2001.

8. IEA directed that the locker banks be removed to determine if ACM had fallen behind the lockers. This work was performed in a manner that prevented the spread of ACMs.<sup>[6]</sup> Some ACM was found behind the lockers, but it appeared to be pre-existing debris.

9. Because asbestos fibers can become airborne and, if inhaled, can cause health problems, precautions are required when ACM is removed. The area in which ACM removal is performed must be isolated from occupied areas of a building. Abatement workers must wear protective clothing. Air sampling outside the containment area must be performed to ensure that asbestos does not escape the containment area.

10. The Department informed Champion that violations of the statute and rules requiring prior notification of asbestos abatement and the rules regarding use of glove bags and inspection of the removal site had been observed.<sup>[7]</sup> Champion's response was requested.

11. On April 30, 2001, Champion responded to the Department's notice of violations. Champion maintained that only 80 linear feet of asbestos was removed, rendering the project exempt from the notice requirement and the cited glove-bagging rule.<sup>[8]</sup> Champion acknowledged that the site inspection had not been properly performed and that procedures would be implemented with IEA to avoid such a problem in the future.<sup>[9]</sup>

12. The Department convened a forum of staff to determine if any action was warranted. The forum concluded that an administrative penalty order was appropriate.<sup>[10]</sup> The forum determined that Champion violated Minn. Stat. § 326.74 and Minn. R. 4620.3410, subp. 1, by failing to provide the Notice of abatement to the Department. Champion's failure to pay the required fee was found to be a violation of Minn. Stat. § 326.75, subd. 3, and Minn. R. 4620.3430, subp. 2. The improper use of glove bagging was found to be a violation of Minn. Rule 4620.3580, subpart 1. Failing to inspect and properly clean the area was found to be a violation of Minn. Rule 4620.3580, subpart 6.F.

13. The forum calculated a proposed penalty based on the seriousness and frequency of the violation and whether the violation was forgivable. None of the violations were repeat violations. The APO Penalty Calculation Worksheet indicates that, "Serious violations include conduct showing disregard of requirements or standards, or violations that present an actual or potential danger to public health or natural resources."<sup>[11]</sup> Only the failure to pay the fee was deemed not serious and forgivable. The remaining three violations were deemed serious and nonforgivable.<sup>[12]</sup> Base penalty amounts of \$500.00 each for the first three violations and \$5,000.00 for the fourth violation were proposed. No upward adjustments to the base penalty were proposed due to Champion's record of rule compliance.

15. On August 16, 2001, the Department issued an APO levying a nonforgivable fine of \$6,000 and a forgivable fine of \$500 against Champion.<sup>[13]</sup> The forum's amounts and reasons for the penalty were adopted by the Department in the APO. The APO also contained a corrective order requiring actions to remedy some of the rule violations and ensure that future violations do not occur. The APO described the means for Champion to appeal the decision.

16. Champion appealed the administrative penalty order by letter dated September 18, 2001.<sup>[14]</sup> The Department issued a Notice of Hearing in this matter on March 28, 2002.<sup>[15]</sup>

17. At the hearing, Jim Swanson, Vice President of Champion, credibly described the current business standard in bidding on jobs similar to that performed at the Afton-Lakeland Elementary School. The current standard assumes that the sort of work performed by Champion on March 19-23, 2001 does not trigger the notification requirement, fee provision and ACM removal standards under Minn. Stat. Chap. 326 and Minn. R. Part 4620.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge and the Department of Health have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.58 and 144.991, subd. 5.

2. Any of the foregoing Findings of Fact that are more properly considered Conclusions of Law are hereby adopted as such.

3. Minn. Stat. § 326.71, subd. 4, defines “asbestos related work” to include enclosure of ACM. Champion enclosed over 260 linear feet of ACM in the Phase 2 portion of the Afton-Lakeland Elementary School. Enclosing that much ACM covered pipe renders the removal of any part of the ACM enclosed subject to the Asbestos Abatement Act.

4. Champion violated both Minn. Stat. § 326.74 and Minn. R. 4620.3410, subp. 1, by not providing notice of asbestos abatement. The violation is not serious, since Champion was following the current business standard interpreting the notice requirement as inapplicable. Champion was not attempting to avoid Department oversight by failing to give the required notice. Champion’s conduct does not constitute a disregard of requirements or standards.

5. Champion violated both Minn. Stat. § 326.75 and Minn. R. 4620.3430, subp. 2, by not paying the required permit fee for the regulated project. The degree of violation is not severe, since Champion was interpreting the fee requirement as inapplicable. Champion was not attempting to avoid its obligations or enrich itself by failing to pay the required fee.

6. Champion violated Minn. R. 4620.3580, subp. 1, by engaging in ACM removal work using the glove bagging method for amounts of ACM in excess of the room limitations of the rule. The violation occurred because the length of the wrapped pipe must be included in the affected distance. The violation is not severe, since significant portions of the ACM were not removed, but covered in place. Champion’s conduct does not constitute a disregard of requirements or standards since it was following a plausible, though incorrect, interpretation of the rule requirements.

7. Champion violated Minn. R. 4620.3580, subp. 6.F., by failing to inspect the area beneath the glove bag operation to ensure that no dust or debris remains from the ACM removal. This violation is severe, since persons, including school children, were exposed to ACM and the attendant health risks of that exposure.

8. An administrative law judge can only recommend a change in the penalty amount if the judge determines that, under the factors set out in Minn. Stat. § 144.991, subd.1, the assessed amount of the penalty is unreasonable.<sup>[16]</sup> Under the circumstances of this case, and assessing Champion’s violations under Minn. Stat. § 144.991, subd. 1 for:

- (a) the willfulness of the violation;
- (b) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (c) the history of past violations;
- (d) the number of violations;

- (e) the economic benefit gained by the person by allowing or committing the violation; and
- (f) other factors as justice may require;

the penalty amount imposed in the Administrative Penalty Order of \$6,500 is reasonable.

8. Based on the factors in the foregoing Conclusion, a nonforgivable penalty in the amount of \$5,000 is reasonable. Rendering nonforgivable the penalties for failure to notify and use of the glove bagging method for excess amounts of ACM is unreasonable.

9. The requirements of the corrective order are reasonable.

Based on the foregoing Conclusions of Law and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATIONS**

1. That the Commissioner affirm the requirements of the correction order issued as part of the Administrative Penalty Order issued against Champion on August 16, 2001.

2. That the Commissioner modify the penalty portion of the Administrative Penalty Order to impose a nonforgivable fine of \$5,000.00 on Champion and three forgivable fines of \$500.00 each.

Dated: June 10, 2002.

\_\_\_\_\_/s/ Richard C. Luis\_\_\_\_\_  
RICHARD C. LUIS  
Administrative Law Judge

### **MEMORANDUM**

Champion has consistently asserted that the amount of ACM removed was below the standard for regulation under Minn. Stat. §§ 326.70-.81 (the Asbestos Abatement Act) and Minn. R. Part 4220. The Department maintained that the definition of asbestos-related work applied to the full length of the pipes. Since the work Champion performed was part of the removal of the entire pipe, the Department asserts that the rules apply from the start.<sup>[17](#)</sup> Minn. Stat. § 326.71, subpart 4, of the Asbestos Abatement Act defines "asbestos-related work" and states in pertinent part:

Subd. 4. Asbestos-related work. "Asbestos-related work" means the enclosure, removal, or encapsulation of asbestos-containing material in a quantity that meets or exceeds 260 linear feet of friable asbestos-containing material on pipes, 160 square feet of friable asbestos-containing material on other facility components, or, if linear feet or square feet cannot be measured, a total of 35 cubic feet of friable asbestos-containing material on or off all facility components in one facility. ... Asbestos-related work includes asbestos abatement area preparation; enclosure, removal, or encapsulation operations; and an air quality monitoring specified in rule to assure that the abatement and adjacent areas are not contaminated with asbestos fibers during the project and after completion.

Champion's logs do not document how many linear feet of ACM was removed from the piping in Phase 2. The Verification of Work Performed by Champion notes that the ACM removal activity conducted took place over 660 linear feet of pipe.<sup>[18]</sup> Department investigators observed another 1100 linear feet of ACM covered piping (Phase 1) that had been prepared or enclosed for removal a few months later. The work performed by Champion crossed the threshold that triggers the Asbestos Abatement Act requirements.

With the application of the Asbestos Abatement Act, Champion was required to do certain things. Filing a notice of the abatement, paying a fee, and following the standards for glove bagging are required, since the project is not exempt. The Department maintains that Champion should not have used glove bagging for this project (which is nonexempt) due to the linear feet of ACM removed per room.<sup>[19]</sup> The ALJ agrees.

The forum supported the finding of the lack of notice and glove bagging violations as serious because, "This violation is **defined as serious** on pages 14, 15, and A11 of Appendix A of the division's Plan for the Use of Administrative Penalty and Cease and Desist Authority."<sup>[20]</sup> The actual language in that document states that, "Division regulatory programs **are likely to consider** the following types of violations as serious ...."<sup>[21]</sup> The appendix to the plan indicates that the examples listed are "violations which the program considers serious ...."<sup>[22]</sup>

Neither the Plan nor Appendix A have been adopted as rules. The wording of the Plan, relied upon by the Department to characterize the violations as serious, does not define these violations as serious. Under appropriate circumstances, these violations may be found not serious. The Department must consider the circumstances of a violation when making its determination. In this matter, Champion was relying upon an erroneous, but commonly held interpretation of the applicability of the rule. There is no evidence in the record to suggest that Champion was acting with knowledge that the notice requirement, fee requirement, or glove bagging rules applied here. Under these circumstances, there is no basis for finding these violations to be serious.



The Department concluded that Champion violated Minn. R. 4620.3580, subp. 6.F., by failing to inspect for visible ACM-containing dust and debris after conducting the glove bagging in the wall cavity above the lockers. This violation was determined to be serious, due to the release of asbestos fibers and potential exposure of them to students and staff at the school.<sup>[23]</sup> The potential for harm is ample support for the Department's finding that this violation was serious. As the holder of an asbestos removal license, Champion is obliged to conduct the removal of ACM in a manner to protect public health, even in a job believed to be exempt. Failing to inspect for dust and debris is a serious violation of that standard.

Under the Department's method of calculation, a penalty based on a violation that is neither repeated nor serious must be forgivable. Three of the four violations in this matter are, as discussed above, neither repeated nor serious. The fourth violation is not repeated, but is serious due to the potential for harm occasioned by the violation. The fourth penalty is appropriately nonforgivable.

R.C.L.

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<sup>[1]</sup> Ex. 11, at 4.

<sup>[2]</sup> *Id.*

<sup>[3]</sup> Ex. 11, at 6.

<sup>[4]</sup> Ex. 11, at 7.

<sup>[5]</sup> Ex. 8, at 2.

<sup>[6]</sup> Ex. 10.

<sup>[7]</sup> Ex. 12.

<sup>[8]</sup> Ex. 13.

<sup>[9]</sup> *Id.*

<sup>[10]</sup> Ex. 15.

<sup>[11]</sup> Ex. 14, APO Penalty Calculation Worksheet Instructions, at 2.

<sup>[12]</sup> The APO Penalty Calculation Worksheet Instructions indicate that a penalty must be serious, repeated, or both to be nonforgivable. Exhibit 14. All other penalties must be forgivable.

<sup>[13]</sup> Ex. 16.

<sup>[14]</sup> Ex. 17.

<sup>[15]</sup> Ex. 1.

<sup>[16]</sup> Minn. Stat. § 144.991, subd. 5(c).

<sup>[17]</sup> As colorfully noted in the inspection comments of the Department's Asbestos Unit, "the first 260 feet is not free." Ex. 5, at 2.

<sup>[18]</sup> Ex. 9, at 10.

<sup>[19]</sup> The removal of ACM from piping along hallways is a common practice in schools and industrial areas. In order to apply the rule's linear foot limitation per room on glove bagging, the Department uses the size of the room on the other side of the hallway to divide up the space. This is a widely acknowledged interpretation of the rule to apply the room size limitation in areas where the measurement is impractical. While not a rule, the Department's interpretation of the rule is a reasonable means of applying the limitation of the glove bagging procedure to unusual spaces.

<sup>[20]</sup> Ex. 15, at 2 and 3 (emphasis added).

<sup>[21]</sup> Ex. 14, at 14 (emphasis added).

<sup>[22]</sup> *Id.*, Appendix A.



<sup>[23]</sup> Ex. 15, at 5.